Asnah bt Ahmad v Mahkamah Perusahaan Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–4–01 OF 2014
ZAWAWI SALLEH, HAMID SULTAN, AND IDRUS HARUN JJCA
27 MARCH 2015

Labour Law — Industrial Court — Joining of parties — Whether Industrial Relations Act 1967 gave wide powers to Industrial Court to join any party connected to proceedings — Whether no requirement party sought to be joined must be or have been claimant's employer — Whether test to be applied for joinder was whether there was 'reasonable factual or legal nexus' between party sought to be joined and issue before court — Whether Industrial Court on hearing merits following joinder could determine whether party so joined was liable to satisfy award of court

The second respondent ('Sime') was the appellant's employer and on finding that she was constructively dismissed from employment. The Industrial Court ordered Sime to pay her RM405,500 in compensation ('the dismissal award'). Subsequent to the making of the award, Sime was wound up but two years earlier, EON Capital Bhd ('EON') had acquired Sime's shares and taken over control of the company. EON, in Sime's name, filed for a judicial review of the dismissal award but the application was dismissed by the High Court and the decision was upheld by the Court of Appeal. The appellant, meanwhile, had filed non-compliance proceedings in the Industrial Court in respect of the dismissal award and she applied to join the third, fourth and fifth respondents to that proceeding on the ground they had a nexus to EON and had involved themselves in the initiation of the judicial review application. The Industrial Court refused to allow the joinder. The High Court refused to quash that decision holding that at all material times the third, fourth and fifth respondents were not the appellant's employers; that there was no fraud to justify lifting of the corporate veil and that the appellant should have filed a proof of debt in Sime's liquidation. In the instant appeal against that decision, the appellant argued that the parties sought to be joined had assumed liability from one another as a result of merger exercises and they had an interest in Sime's undertakings. Accordingly, the joinder should have been allowed and the parties so joined should have been directed by the Industrial Court to explain their involvement in the judicial review proceedings and to allow the court to determine whether they had, in fact, assumed liability to satisfy the dismissal award.

Held:

(1) No reasonable tribunal appraised with the facts of this case would say there was no factual or legal nexus of the third, fourth and fifth respondents in relation to the dismissal award. The test to be applied for joinder was whether there was any 'reasonable factual or legal nexus' between the respondents concerned and the matter before the Industrial Court as to require them to answer to that court for their involvement in the dispute and, if appropriate, be liable under the dismissal award upon the hearing of merits (see paras 11(d) & 12).

(2) The court noted that in support of the judicial review proceedings against the dismissal award, one of EON's vice-presidents had deposed an affidavit stating that Sime was prepared to pay the dismissal award into a stakeholder's account. Common sense dictated that this was prima facie indication of assumption of liability and for what purpose EON did it or whether it would amount to admission of liability in the event the award was sustained were issues the Industrial Court had to consider after joinder was allowed (see para 7(e)).

(3) The Industrial Court committed a grave error of law in the application of fact while the High Court's grounds for its decision were erroneous and had no nexus to industrial jurisprudence as set out in the Industrial Relations Act 1967 ('IRA). Section 29(a) (b) of the IRA gave wide powers to the Industrial Court to join or summon any person who, in the court's opinion, was connected with the proceedings. There was no requirement for joinder that the party summoned had to be the appellant's employer (see paras 11 & 11(b)).

(4) The Industrial Relations Act 1967 was a social legislation and third parties could be made liable to pay an award notwithstanding they were not the employers. Third parties could not resist joinder or deny liability on the ground there was no privity, or of being a separate legal entity, etc when there was sufficient nexus between the party to be joined and the party named in the reference. The threshold test at the joinder stage was low and it was whether the employee could demonstrate by prima facie evidence that the party requested to be joined directly, indirectly or otherwise had assumed liability or could be made partly or wholly liable for payment of the award. The issue of liability could only be dealt with after the joinder was done and the merits were heard. So long as the employee's complaint was not frivolous, vexatious and/or an abuse of process of court, joinder should be permitted if nexus was shown (see para 3).

[Bahasa Malaysia summary

Responden kedua ('Sime') ialah majikan perayu dan mendapati bahawa dia telah dipecat secara konstruktif daripada pekerjaan. Mahkamah Perusahaan mengarahkan Sime membayar RM405,500 sebagai pampasan ('award

A pemecatan'). Selepas membuat award itu, Sime telah digulung tetapi dua tahun sebelumnya, EON Capital Bhd ('EON') telah memperoleh saham Sime dan mengambil alih kawalan syarikat. EON, atas nama Sime, memfailkan semakan kehakiman award pemecatan itu tetapi permohonan tersebut telah ditolak oleh Mahkamah Tinggi dan keputusan itu dikekalkan oleh Mahkamah Rayuan.
B Perayu, sementara itu, telah memfailkan prosiding ketidakpatuhan di Mahkamah Perusahaan berkenaan dengan award pemecatan itu dan dia memohon untuk menggabungkan responden ketiga, keempat dan kelima bahawa prosiding atas alasan mereka mempunyai hubungan dengan EON dan telah melibatkan diri mereka dalam permohonan awalan semakan kehakiman.
C Mahkamah Perusahaan enggan membenarkan percantuman itu. Mahkamah Tinggi menolak untuk membatalkan keputusan memutuskan bahawa pada semua masa yang material responden ketiga, keempat dan kelima bukan majikan perayu; bahawa tidak ada fraud untuk mewajarkan menyingkap tabir korporat dan bahawa perayu sepatutnya memfailkan bukti hutang dalam
D pembubaran Sime. Dalam rayuan ini terhadap keputusan itu, perayu berhujah bahawa pihak-pihak yang hendak digabungkan mempunyai andaian liabiliti daripada satu sama lain akibat dari penggabungan dan mereka mempunyai kepentingan dalam aku janji Sime. Oleh itu, percantuman itu sepatutnya dibenarkan dan pihak-pihak yang digabungkan sepatutnya diarahkan oleh
E Mahkamah Perusahaan untuk menerangkan penglibatan mereka dalam prosiding semakan kehakiman dan untuk membolehkan mahkamah untuk menentukan sama ada mereka mempunyai, sebenarnya, andaian liabiliti untuk memenuhi kehendak award pemecatan itu.

F **Diputuskan:**

(1) Tiada tribunal munasabah dinilai dengan fakta kes ini akan menyatakan tidak ada pertalian fakta atau undang-undang daripada responden ketiga, keempat dan kelima berhubung dengan sesuatu award pemecatan itu.
G Ujian untuk digunakan bagi percantuman ialah sama ada terdapat apa-apa 'reasonable factual or legal nexus' antara responden yang berkenaan dan perkara itu sebelum Mahkamah Perusahaan sebagai menghendaki mereka untuk menjawab kepada mahkamah akan penglibatan dalam pertikaian itu dan, jika sesuai, bertanggungjawab di
H bawah award pemecatan itu apabila mendengar merit (lihat perenggan 11 (d) & 12).

(2) Mahkamah itu berkata bagi menyokong prosiding semakan kehakiman terhadap award pemecatan itu, salah seorang naib presiden EON telah mendepos afidavit yang menyatakan bahawa Sime telah bersedia untuk
I membayar award pemecatan itu kepada akaun pemegang saham. Logik akal menetapkan bahawa ini adalah petunjuk prima facie mengenai andaian liabiliti dan untuk tujuan apa EON yang melakukannya atau sama ada ia akan berjumlah pengakuan liabiliti sekiranya award itu kekal adalah isu-isu yang perlu dipertimbangkan oleh Mahkamah Perusahaan

selepas percantuman dibenarkan (lihat perenggan 7(e)).

(3) Mahkamah Perusahaan melakukan kesilapan besar undang-undang dalam permohonan fakta manakala alasan Mahkamah Tinggi bagi keputusannya adalah salah dan tidak mempunyai kaitan perundangan industri seperti yang dinyatakan dalam Akta Perhubungan Perusahaan 1967 ('IRA). Seksyen 29 (a) (b) IRA memberi kuasa yang luas kepada Mahkamah Perusahaan untuk mencantumkan atau memanggil mana-mana orang yang, pada pendapat mahkamah, adalah berkaitan dengan prosiding itu. Tidak ada keperluan untuk pihak yang dicantumkan yang dipanggil perlu menjadi majikan perayu (lihat perenggan 11 & 11(b)).

(4) Akta Perhubungan Perusahaan 1967 adalah satu undang-undang sosial dan pihak ketiga boleh dibuat bertanggungjawab untuk membayar award walau apa pun mereka bukan majikan. Pihak ketiga tidak dapat menahan percantuman atau menafikan liabiliti atas alasan tidak ada priviti, atau menjadi entiti undang-undang yang berasingan, dan lain-lain apabila terdapat pertalian yang mencukupi antara pihak supaya dihubungkan dan pihak yang dinamakan dalam rujukan. Ujian ambang pada peringkat percantuman adalah rendah dan ia adalah sama ada pekerja itu dapat menunjukkan bukti prima facie bahawa pihak itu diminta supaya dicantumkan secara langsung, liabiliti secara tidak langsung atau sebaliknya mempunyai andaian liabiliti atau boleh dibuat sebahagiannya atau keseluruhannya bertanggungjawab ke atas pembayaran award itu. Isu liabiliti hanya boleh diuruskan selepas percantuman itu dilakukan dan merit didengar. Selagi aduan pekerja tidak adalah remeh dan menyusahkan dan/atau menyalahgunakan proses mahkamah, percantuman harus dibenarkan jika hubungan telah ditunjukkan (lihat perenggan 3).]]]

Notes

For cases on joining of parties, see 8 *Mallal's Digest* (5th ed, 2015) see paras 1809–1811.

Cases referred to

Co-Operative Central Bank Ltd & Ors v Rashid Cruz Abdullah & Ors And Other Appeals [2004] 1 MLJ 626; [2004] 1 CLJ 849, CA (refd)

Hochtief Gammon v Industrial Tribunal Orisa 1964 AIR 1746, SC (refd)

Legislation referred to

Industrial Relations Act 1967 ss 29(a)(b), 32(1)(a), 56(1)(2)(a)(i)

Appeal from: Judicial Review Application No 25–84–04 of 2013 (High Court, Kuala Lumpur)

Ambiga Sreenevasan (with Shireen Selvaratnam and Azlan Zainal Abidin) (Zainal Abidin & Co) for the appellant.
Datuk Ben Chan Chong Choon (with Alane Neo Hwee Teng) (Mah-Kamariah & Philip Koh) for the third respondent.
Alex Tan Chie Saian (with Dennis Goh Teik Chuan) (Wong Kian Kheong) for the fourth and fifth respondents.

Hamid Sultan JCA:

[1] The appellant's appeal is against the decision of the learned High Court judge who refused to quash the decision of the Industrial Court, which refused to allow the appellant to join the third to fifth respondents in respect of a non-compliance proceeding related to an award obtained against the second respondent. We heard the appeal on 28 January 2015 and reserved judgment. My learned brothers Mohd Zawawi bin Salieh JCA and Idrus bin Harun JCA have read the judgment and approved the same. This is our judgment.

PRELIMINARY

Jurisprudence relating to joinder of parties.

[2] This judgment deals with the jurisprudence relating to joinder of parties in Industrial Court. The relevant sections which need to be considered under the Industrial Relations Act 1967 (IRA 1967) are ss 29(a)(b), 32(1)(a) and 56(1)(2)(a)(i).

Section 29(a) (b)

> 29. The Court may, in any proceedings before it— (a) order that any party be joined, substituted or struck off; (b) summon before it the parties to any such proceedings and any other person who in its opinion is connected with the proceedings.

Section 32(1) (a) reads as follows:

> 32(1) Any award made by the Court under this Act shall be binding on—
>
> (a) all parties to the dispute or the reference to the Court under subsection 20(3) appearing or represented before the Court and all parties joined or substituted or summoned to appear or be represented before the Court as parties to the dispute or the reference to the Court under subsection 20(3).

Section 56(1) (2)a(i) reads as follows:

> (1) Any complaint of any term of any award or of any collective agreement which has been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any trade union or person bound by such award or agreement.
>
> (2) The Court may, upon receipt of the complaint,—

(a) make an order directing any party—

(i) to comply with any term of the award.or collective agreement.

The general jurisprudence from the above sections as well as supportive case laws can be summarised as follows:

(a)IRA 1967 is a social legislation;

(b)third parties can be made liable to pay the award notwithstanding that they were not the employer;

(c)third parties cannot resist joinder or deny liability on the grounds there is no privity or is a separate legal entity, etc when there is sufficient nexus between the party to be joined and the party named in the reference;

(d)the threshold test to be employed at the joinder stage appears to be whether the employee can demonstrate by way of prima facie evidence that the party who are requested to be joined have directly and/or indirectly and/or otherwise assumed liability or can be ,made liable partly or wholly for the payment of the award or for that matter purported award in cases where award has not been delivered. In essence, the threshold to satisfy the Industrial Court is low based on the above sections as well as suportive case laws in this area of jurisprudence. As long as the complaint of the employee is not frivolous, vexatious and/or abuse of process of court, there should be no hindrance in permitting the joinder if nexus is shown.

(e)the issue of liability can only be dealt with after the joinder and hearing on merits. The parties to be joined should not at joinder stage be allowed to submit on the merits. Their presence at the joinder stage is only to verify the complaint of the employee to ensure that the facts relied on by the employee are credible.The learned counsel for the third respondent's submission in essence they are not the employer; and we quote:

... it is highly undesirable to have one law for the Industrial Court and another law for other courts. There must only be one law for all.

Brief facts

[3] The respondents are as follows:

(a) second respondent (Sime Securities Sdn Bhd) now in liquidation and the employer of the appellant;

(b) third respondent is EON Bank Berhad;

(c) fourth respondent MIMB is Investment Bank Bhd; and

(d) fifth respondent is EONCAP Securities Sdn Bhd.

[4] The third respondent is represented by one firm of solicitors and the fourth and fifth respondents are represented by separate firm of solicitors.

[5] The basic facts are not in dispute. It can be summarised as follows:

(a) the appellant obtained an award for RM405,500 on 13 December 2007 against the second respondent. At the time the matter was referred to the Industrial Court the second respondent was not wound up. At the time the award was made, there was a winding up order against the second respondent;

(b) the constructive dismissal was said to have taken place on 17 November 1998 and the award was only made on 13 December 2007;

(c) second respondent shares were acquired by EON Capital Berhad (EON) on 28 October 2005 who had taken over the day-to-day control of the effective management of the second defendant;

(d) the third to fifth defendant had nexus to EON Capital which is not necessary to elaborate here;

(e) in the name of Sime, judicial review proceedings were filed and the controlling mind was EON as stated in para 3 above. Abdulalim bin Zakaria who was one of the Vice-President of Eon, had filed the supporting affidavit for the judicial review application and in that it was stated that the second respondent was prepared to pay the 'Dismissal award' into a stakeholders account. *We like to pause here for a moment to say that common sense will dictate this is prima facie indication of assumption of liability and for what purpose EON did or whether it will amount to admission of liability in the event the award is sustained are issues which the Industrial Court had to consider after the joinder has been allowed* (Emphasis added);

(f) second respondent's judicial review application managed by EON was not successful at the High Court. And the High Court dismissed it on 15 July 2009 and on appeal the Court of Appeal dismissed it on 5 January 2010; and

(g) the appellant not knowing that EON had initiated the judicial review application on 25 January 2008 had filed non-compliance proceedings in the Industrial Court on 30 January 2008. The non compliance proceeding was proceeded with an application of joinder against the third to fifth respondent who were instrumental and/or had nexus to EON who had interfered in the enforcement of the award by initiating a judicial review application which was as stated earlier dismissed by the Court of Appeal.

[6] Learned counsel for the appellant Chevalier Ambiga Sreenevasan has summarised the issues relating to the joinder as follows:

> (3) The critical issue before the court (given Sime's liquidation) is whether the joinder is necessary to make the adjudication of the Dismissal Award effective and enforceable. In determining this issue, the appellant will

submit that it is 8 necessary for parties to come before the court to explain its involvement in the proceedings relating to the Dismissal Award and to answer the question of whether they have assumed liability for the obligation that had been ordered by the Industrial Court (under the Dismissal Award described below).

(4) As can be seen from the conduct of the parties and the documentary evidence before the court, the parties sought to be joined had assumed liability from one another from onward merger exercises and clearly have an interest in the undertaking of Sime.

(5)As such, as a matter of law, the joinder of the parties ought to have been allowed and they ought to have been directed to explain with candour their involvement in the Dismissal proceedings and whether they had in fact assumed liability and if so, in what manner among themselves as to now distance themselves from the obligation that was imposed by the Industrial Court.

[7] The learned trial judge in dismissing the application for judicial review had in the grounds stated:

(a) the third to fifth respondents were not at all material times, the appellant's employers;

(b) there was no fraud to justify lifting of the corporate veil; and

(c) that the liquidator were more than able to represent the interests of the second respondent and the appellant should have filed a proof of debt.

The grounds stated above are erroneous and has no nexus to Industrial jurisprudence as set out in the IRA 1967.

[8] Learned counsel for the third to fifth respondents vehemently relied on the grounds of the learned trial judge to assert that the appeal must be dismissed.

[9] We have read the appeal record and the submission of the parties in detail. We would like to thank the counsel for the able submission. We are of the considered view that the Industrial Court has committed grave error of law in the application of fact which the learned trial judge was not able to correct, by issuing the order of certiorari and incidental directions. Our reasons inter alia, are as follows:

(a) case laws in this area of jurisprudence must be confined to the facts and the nexus test as to liability (see Annotated Statutes of Malaysia, IRA 1967, 2009 Issue pp 404 and 405). There is no requirement under the IRA 1967 to enable joinder that the parties must be the appellant's

employers. This is a grave error of law and does not subscribe to the Act and the jurisprudence relating to joinder. In our view, the Supreme Court of India case of *Hochtief Gammon v Industrial Tribunal Orisa* 1964 AIR 1746 quoted by parties does not deal with an equipollent Malaysian provision;

(b) our provision for joinder is much wider than the provision relied by the Indian Supreme Court in *Hochtiefs case*. In fact, the court there was not dealing with equipollent section, as s 29(a) (b) of IRA 1967 which gives wide powers to the Industrial Court to join or summon any person who in the opinion of the court is connected with the proceedings. The distinction is like an apple and orange and there is no requirement that the person summoned must have an employer or employee relationship;

(c) The test employed by the Indian Supreme Court had a restricted application to IRA 1967 and is also not based on employer-employee relationship. The test laid down by P B Gajendragadkar J reads as follows:

> The test always must be, is the addition of the party necessary to make the adjudication itself effective and enforceable? In other words, the test well be, would be non-joinder of the party make the arbitration proceedings ineffective and unenforceable? It is in the light of this test that the implied power of the Tribunal to add parties must be held to be unlimited.

(d) Justice Gajendragadkar was dealing with 'implied powers' when propounding the test. IRA 1967 has express powers and that power is much wider than that found in Indian provision. The more appropriate test to be applied in the Malaysian context was propounded by Justice Gopal Sri Ram in *Co-Operative Central Bank Ltd & Ors v Rashid Cruz Abdullah & Ors And Other Appeals* [2004] 1 MLJ 626; [2004] 1 CLJ 849. The test is 'reasonable factual or legal nexus' test a 'wide net' to facilitate all maladies of third parties to answer to the Industrial Court for their involvement in the dispute and if appropriate be liable under the award upon hearing the merits. His Lordship on the test observed as follows:

> Nevertheless, having scrutinised the order dated 2 September 1993 pursuant to which the receivers were discharged and the appointees were appointed, we are unable to see any reasonable factual or legal nexus between BNM and the dispute presently before the industrial Court. Even taking the most extreme position on the facts, we are unable to perceive a situation whereby BNM can be held responsible for the termination of the respondents. We have therefore come to the conclusion that Appeal No W-01-67-1999 has merit. We allow it in so far as the judge directed the addition of BNM as a party to the proceedings before the Industrial Court. The order is hereby set aside.

[10] In our view, no reasonable tribunal appraised with the facts of this case

will say that there is no factual or legal nexus to the third to fifth respondents in relation to the award.

[11] For reasons stated above, we take the view the appeal must be allowed with costs. The decision of the High Court and Industrial Court must be set aside. And both the applications of joinder by the appellant in the Industrial Court must be allowed and the issue of liability must be heard on merits. Deposit to be refunded. We hereby order so.

Order accordingly.

Reported by Ashok Kumar